



December 18, 2000

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2000-4735

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 142349.

The Texas Education Agency (the "agency") received two written requests for various records pertaining to the Renaissance and Heritage Academy Charter Schools (the "charter schools").¹ You contend that the requested information is excepted from disclosure under section 552.103 of the Government Code.²

A governmental body has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. Under section 552.103(a) and (c), the test for meeting this burden is a showing that (1) litigation involving the governmental body is pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103. "Litigation" within section 552.103

¹One of the requests also seeks information about other schools. Because you do not contend that this other requested information is excepted from public disclosure, we assume the agency has released this information to the requestor.

²Because we resolve your request under section 552.103, we need not address the applicability of the other exception you raised, section 552.116 of the Government Code.

includes a contested case under the Administrative Procedure Act that is before an administrative agency. Open Records Decision No. 588 (1991).

We have reviewed your arguments under section 552.103 and the documents at issue. We conclude that you have met your burden in establishing that litigation between the agency and both of the charter schools was reasonably anticipated on the date the agency received the two records requests. We further conclude that the documents at issue "relate" to the anticipated litigation. The agency therefore may withhold the requested records pursuant to section 552.103 of the Government Code, with the following exceptions.

Section 552.103 does not protect information held by both the agency and the respective charter school. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Consequently, to the extent that the respective opposing party in the anticipated litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestors pursuant to section 552.103.

In this regard, we note that among the documents contained in Exhibits 1 and 3 are pieces of correspondence, including e-mails, between the agency and representatives of the charter schools that are not protected under section 552.103 and therefore must be released to the requestors. Similarly, all financial records contained in Exhibit 2 and elsewhere that the agency obtained during the course of audits of the charter schools³ must be released to the requestors. *See also* Gov't Code § 552.022(a)(3) ("information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" must be released to public unless expressly made confidential under other law). Finally, included in the submitted information are several published newspaper articles. Newspaper clippings, whether or not they relate to the anticipated litigation, constitute information that is within the public domain and, as such, cannot be withheld under section 552.103 and thus must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

³We assume for purposes of this ruling that the agency's audits of both charter schools are on-going and not yet completed. *See* Gov't Code § 552.022(a)(1) (completed audit must be released to public unless subject to Government Code section 552.108 or expressly made confidential under other law).

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/RWP/seg

Ref: ID# 142349

Encl. Submitted documents

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